

I. INTRODUCTION

This case has returned to this Court after review by the Ninth Circuit Court of Appeals.

In 2000, the City of Martinez ("City" or "Martinez") filed a third-party complaint against New Hampshire Insurance Company ("NH") in the Bankruptcy Court for the Northern District of California. NH prevailed on its motion for summary judgment, a ruling which the City appealed to this Court, which reversed. On appeal, the Ninth Circuit reversed this Court and remanded with instructions that this Court enter judgment for NH.

Presently before the Court is NH's motion for attorney's fees in the amount of \$190,971.00.

For the reasons stated herein, the Court DENIES NH's motion.

1 **II. BACKGROUND**

2 This third-party action arises from litigation over a 1997
3 lease agreement ("Lease") between the City of Martinez and the
4 bankrupt debtor Captain Blyther's Inc. ("Captain Blyther's").¹
5 The Lease contained an attorney fee provision. See New Hampshire
6 Insurance Company's Memorandum in Support of Motion for Attorney's
7 Fees at 1 ("NH's Mem."). The Lease required Captain Blyther's to
8 obtain insurance for the leased premises and to name Martinez as
9 an additional insured. See Order Remanding Case to Bankruptcy
10 Court at 2, Docket Entry No. 23 ("Remand Order"). Captain
11 Blyther's selected New Hampshire Insurance Company as the carrier
12 of the policy ("Policy"). Id. The Policy does not contain an
13 attorney fee provision. The City of Martinez's Memorandum in
14 Opposition to Motion for Attorney's Fees at 1 ("City Mem.").

15 In 1998, Captain Blyther's filed a Chapter 11 Bankruptcy
16 Petition and, in 1999, filed a complaint in the Bankruptcy Court
17 against the City of Martinez for alleged breaches of the Lease.
18 Remand Order at 5. The City tendered its defense to NH, which
19 refused to provide coverage. Id. at 6. Then, in 2000, the City
20 filed a third-party complaint against NH. Id. After the
21 Bankruptcy Court granted NH's motion for summary judgment, finding
22 that NH had no duty under the Policy to defend Martinez in this
23 matter, the City of Martinez appealed the Bankruptcy Court's
24 decision to this Court. Id. at 6-7. This Court vacated and
25 reversed the judgment of the Bankruptcy Court, a decision that the

26 ¹ Alfred John Schlette is the sole officer, director, and
27 shareholder of Captain Blyther's. Remand at 2.

1 Ninth Circuit, in 2005, reversed with instructions to enter
2 judgment for NH. NH's Mem. at 3. This Court entered judgment for
3 NH in March 2006. See Docket Entry No. 32.

4 Now, NH moves for attorney's fees in accordance with Local
5 Rule 54-6 in the amount of \$190,971.00. NH's Mem. at 3.

6 **III. DISCUSSION**

7 The Court's ruling on this motion turns on the merit of NH's
8 assertion that though NH is not a signatory to the Lease, it can
9 recover attorney fees through it because the instant action "is
10 premised on the complaint filed by Captain Blyther's against
11 Martinez. The Captain Blyther's complaint is premised on a breach
12 of the Lease, which contains an attorney fee provision." NH's
13 Mem. at 4. If this contention is meritless, NH's other
14 contentions are without foundation and the Court will dismiss the
15 motion.²

16 The City of Martinez contends that the "litigation between
17 Martinez and New Hampshire arises out of an insurance contract
18 between Martinez and New Hampshire. That insurance contract does
19 not provide for attorney fees to the prevailing party in a dispute
20 over coverage." City Mem. at 1.

21 NH faces an uphill battle. The Bankruptcy Code does not
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23 ² More specifically, NH contends that (A) state law controls
24 the issue of attorney's fees, (B) the third party action by
25 Martinez against NH arose from the lease and was "thus on the
26 contract," (C) NH is owed fees because it was the prevailing party,
27 (D) California Civil Code § 1717 applies to non-signatories to a
contract, (E) the fees provision in the contract is broad enough to
encompass the action by Martinez against NH, (F) NH "is subrogated
to the rights and liabilities of Martinez under the lease" and (G)
the fees and costs sought by NH are reasonable.

1 provide a general right to attorney's fees. See Heritage Ford v.
2 Baroff (In re Baroff), 105 F.3d 439, 441 (9th Cir. 1997). A
3 prevailing party, however, "may be entitled to an award of
4 attorney fees in accordance with applicable state law if state law
5 governs the substantive issues raised in the proceedings." Id.
6 (citations removed). "Because state law necessarily controls an
7 action on a contract, a party to such an action is entitled to an
8 award of fees if the contract provides for an award and state law
9 authorizes fee shifting arrangements." Id.

10 In California, attorney's fees are awarded to the prevailing
11 party in an action on a contract, where the contract specifically
12 provides for the award of attorney's fees and costs, even if the
13 prevailing party is not a signatory to the contract. See
14 California Civil Code § 1717. Section 1717 was enacted to "avoid
15 the perceived unfairness of one-sided attorney fee provisions."
16 International Billing Services, Inc. v. Emigh, 84 Cal. App. 4th
17 1175, 1182 (Cal. Ct. App. 2000). "Its purposes require section
18 1717 be interpreted to further provide a reciprocal remedy for a
19 nonsignatory defendant, sued on a contract as if he were a party
20 to it, when a plaintiff would clearly be entitled to attorney's
21 fees should he prevail in enforcing the contractual obligation
22 against the defendant." Reynolds Metals Company v. Alperson, 25
23 Cal.3d 124, 128 (1979) (emphasis added).

24 The Court finds that NH cannot recover attorney's fees. The
25 City sued NH as a defendant on the Policy, not the Lease. Though
26 the Lease is part of the factual genealogy of the third-party
27 action, the action was an adjudication of the parties'

1 responsibilities and rights under the Policy.³

2 NH cites four cases in support of its contention, none of
3 which are in the least helpful. In the first, California
4 Wholesale Material Supply, Inc. v. Wilson & Sons, Inc., a
5 subcontractor assigned its accounts receivable to the plaintiff,
6 pursuant to a security agreement that contained an attorney's fees
7 provision. 96 Cal. App. 4th 598, 605 (Cal. Ct. App. 2002). The
8 plaintiff lost in its action against the defendant Wilson & Sons,
9 Inc. to collect the fees owed by the subcontractor. Id. 600-601.
10 The California Court of Appeal held that the defendant was
11 entitled to fees because the plaintiff, as assignee, held the
12 rights and reciprocal obligations of the subcontractor under the
13 security agreement, including attorney fees. Id. at 605-606.

14 Unlike the defendant in California Wholesale, NH is not an
15 assignee entitled to the rights under the Lease.

16 In the second case, In re Baroff, the Ninth Circuit, under
17 California Civil Code § 1717, awarded attorney's fees to the
18 prevailing party because the parties had "expressly agreed in the
19 settlement agreement that the prevailing party in an action to
20 enforce the agreement should recover his attorney fees." 105 F.3d
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22 ³ On this issue, the Court rejects NH's assertion that the
23 attorney's fees provision in the Lease is broad enough to encompass
24 the action between Martinez and NH. NH's Mem. at 7. That
25 provision provides for attorney's fees in the event that a suit is
brought by the lessor against the lessee to enforce payment of
rent, conditions of the Lease, unlawful detention of the property,
and possession. See Declaration of Scott M. Reddie in Support of
NH's Motion for Attorney's Fees, Ex. A at 755. In addition to the
fact that NH has not assumed or been assigned any rights under the
Lease, the third-party action was not brought to litigate any of
the issues covered by the provision.

1 at 443.

2 Unlike the factual situation in In re Baroff, the third-party
3 action in this case was brought to enforce the Policy, a contract
4 without a fee provision, not the Lease.

5 In the third case, Texas Commercial Bank v. Garamendi, the
6 California Court of Appeal held that the plaintiffs/appellants
7 were entitled to attorney's fees under the investment contracts
8 because the defendants/respondents, having been appointed
9 conservators of the insolvent insurer, "stand[] in the shoes" of
10 the insolvent insurer. 28 Cal. App. 4th 1234, 1245 (Cal. Ct. App.
11 2005).

12 Unlike the defendants/respondents in Texas Commercial, NH has
13 not been appointed as a conservator nor does it occupy any
14 position in which it assumes the legal rights and responsibilities
15 of the parties to the Lease.

16 The final case NH cites on this issue is Dell Merk, Inc. v.
17 Franzia, 132 Cal. App. 4th 443 (Cal. Ct. App. 2005). Dell Merk
18 Inc. secured a loan from Pacific State Bank through a security
19 contract which contained an attorney's fees provision, and,
20 secondly, through a pledge of security in the form of an
21 assignment of proceeds from a construction contract Dell Merk Inc.
22 had with Bobcat Central. Id. at 445-446. Pacific State Bank
23 later tried - and failed - to recover money owed by Dell Merk Inc.
24 from Bobcat Central through the security agreement with the
25 attorney fee provision and through its assignment of proceeds from
26 the construction contract. Id. at 447-448.

27 Because the Bank was entitled to bring suit under the
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1 security agreement, the California Court of Appeal ruled that,
2 under the reciprocal arrangement mandated by section 1717, Bobcat
3 Central was owed attorney's fees for its defense in the action on
4 the security agreement, even though it was not a signatory to the
5 agreement. Id. at 456. The court, however, ruled that it was not
6 owed money on the action under the assignment because that
7 contract - the one between Dell Merk Inc. and Bobcat - contained
8 no attorney fees provision. Id. at 454.

9 Dell Merk Inc. involves a formal, legal assumption and
10 assignment of rights for which there is no parallel in the present
11 action.

12 NH loudly bruits the fact that "California courts liberally
13 construe the term 'on a contract' as used within section 1717. As
14 long as the action involve[s] a contract it is on [the] contract
15 within the meaning of Section 1717." Dell Merk, Inc., 132 Cal.
16 App. 4th at 455 (citations and internal quotation marks removed).

17 Though that statement is apparently broad, the principle it
18 lays forth is applied more narrowly, indicating that a more
19 careful reading of the statement is warranted. Dell Merk itself
20 is an instance of this:

21 The [California] Supreme court has concluded that Section
22 1717 provides a reciprocal remedy for a nonsignatory
23 defendant sued on a contract as if he were a party to it, if
24 the signatory would clearly be entitled to attorneys' fees
25 should he prevail in enforcing the contractual obligation
against the [nonsignatory]. Read literally, the requirements
[] are met: Bank, in an action on a contract, sought damages
from Franzia, a nonsignatory defendant. Had Bank established
that Franzia was bound by the contract, it would have been
entitled to attorneys' fees consistent with the terms of the
security agreement.

27 Id. (citations and quotation marks removed).

1 The instant case is not like Dell Merk, upon which NH so
2 heavily relies. The City of Martinez brought an action on the
3 Policy, to which NH was a signatory. NH was not sued on the Lease
4 and had no rights under it.

5 Yet, NH contends that because the Ninth Circuit and this
6 Court looked to the Lease to find out whether NH was bound by the
7 Policy to provide a defense, this action was therefore on the
8 Lease. Reply to Opposition to NH's Motion for Attorney's Fees at
9 2. The Court finds that merely using the Lease to flesh out the
10 factual circumstances surrounding the Policy does not constitute
11 an action on the Lease.

12 The Court's determination that the Policy, rather than the
13 Lease, is the contract at issue disposes of NH's contentions, as
14 listed in Footnote 2⁴, though one particular contention - that of
15 subrogation - is worth one final note.

16 NH contends that

17 had Martinez convinced the Court that it was entitled to a
18 defense in the action brought against it by Captain
19 Blyther's, and had Martinez ultimately prevailed in its
20 action, Martinez would be entitled to attorneys' fees against
21 Captain Blyther's under the Lease. New Hampshire, after
defending Martinez in the action, would then be subrogated to
Martinez' [sic] rights to collect attorneys' fees under the
Lease. Accordingly, New Hampshire should be entitled to its
attorneys' fees based on the Lease.

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24 ⁴ Specifically, the Court agrees that state law controls the
issue of attorney's fees and that section 1717 can apply to non-signatories of a contract. The Court does not find that the third-party action was on the Lease, nor does it find that NH was the prevailing party in any way that would entitle NH to attorney's fees. Because of these findings, the Court finds it unnecessary to consider whether the amount of fees and costs sought by NH is reasonable. This issue of the breadth of the Lease's attorney's fees provision was addressed in Footnote 3.
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1 NH's Mem. at 10.

2 NH is hoist by its own petard. This contention is a list of
3 contingencies, not one of which has occurred.

4 NH does no better in the case law it cites. The first,
5 Employers Mutual Liability Insurance Company v. Tudor-Saliba
6 Corporation, 17 Cal.4th 632, 639 (1998), is particularly
7 inapposite because it deals with subrogation rights under a policy
8 for workers' compensation insurance. The second, Allstate
9 Insurance Company v. Loo, states that an "insurer/subrogee paying
10 for a loss has the right to pursue its insured's rights and
11 remedies against the third-party causing the loss." 46 Cal. App.
12 4th 1794, 1799 (Cal. Ct. App. 1996). Because NH refused to
13 provide a defense for the City of Martinez, it cannot be said to
14 be "paying for the loss." The third case cited, Texas Commerce
15 Bank v. Garamendi, was discussed above.

16 **IV. CONCLUSION**

17 The Court finds that New Hampshire Insurance Company is not
18 entitled to attorney's fees. Accordingly, NH's motion is DENIED.

19 The Court will not now impose sanction on NH, as requested by
20 the City of Martinez.

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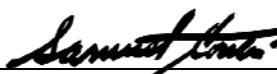
22 IT IS SO ORDERED.

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24 Dated: May 11, 2006

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UNITED STATES DISTRICT JUDGE

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